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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN FITCH, Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF ELECTIONS, Defendant and Respondent.	A155058 (San Francisco County Super. Ct. No. CGC-18566257)

Ed Lee won the June 2015 election for Mayor of San Francisco. He died unexpectedly in December 2017 and, pursuant to the San Francisco City Charter, London Breed, the President of the Board of Supervisors, was named interim mayor. In May 2018, days before the scheduled June 5 election, appellant John Fitch, claiming he was a write-in candidate for mayor in 2015 and should have been appointed interim mayor, filed a complaint against the Department of Elections, seeking to stop the 2018 election. The trial court rejected Fitch's attempt and denied an injunction, and weeks later sustained without leave to amend a demurrer to Fitch's complaint. We affirm.

The General Setting

In 2015, Ed Lee was re-elected as mayor of San Francisco. In December 2017, Lee died unexpectedly, and pursuant to section 13.101.5 of the City Charter,[1] London

[1] Section 13.101.5, entitled "Vacancies," provides that "[i]f the Office of Mayor becomes vacant because of death . . . the President of the Board of Supervisors shall

Breed, President of the Board of Supervisors, became acting Mayor. Then, the next month, the Board of Supervisors—once again acting pursuant to Section 13.101.5 of the Charter—voted to appoint Mark Farrell to fill the vacancy as Mayor. Under the Charter, Mayor Farrell could serve only until the voters elected a new Mayor at the next election to be held after Lee's death, set for June 5, 2018.

The Proceedings Below

On May 3, days before the scheduled election, Fitch filed a complaint against the Department of Elections (Department), followed on May 22 by a First Amended Complaint. Three days later Fitch filed an ex-parte application for a temporary restraining order and preliminary injunction, and on May 31 an order to show cause issued, set for hearing on Monday, June 4.

The Department filed opposition to Fitch's request for injunction, accompanied by a declaration of registrar of voters John Arntz and a request for judicial notice.

The motion came on for hearing as scheduled, before the Honorable Harold Kahn, a most experienced jurist. Following the appearances, the hearing began with this observation from Judge Kahn:

"THE COURT: So, Mr. Fitch, I tried to look at this from every angle and see if I could find a way to understand your arguments. And I haven't succeeded; it does not seem to me that you either have an entitlement to be the mayor or an entitlement to put off tomorrow's election.

"And I also believe that it would cause great disruption and be contrary to the public interest to put off tomorrow's election.

"But I'm desirous of hearing from you. Anything more that you think you can tell me that might shed light on this that I might not have considered?"

Fitch responded for some two pages, included within which was his attempt to dismiss—and ask Judge Kahn to disregard—the Department's opposition. To little avail, Judge Kahn going on the say that, "[t]o be really candid with you . . . . [¶] . . . [¶] I

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become Acting Mayor and shall serve until a successor is appointed by the Board of Supervisors." [Citation.]

reviewed your papers with great care on Thursday night, and then I read them again Friday. And even if I didn't receive opposition papers from the City, I would deny your request for preliminary injunction."

Fitch persisted, to be met with this from Judge Kahn, "[i]n my view, you are mistaken as to law; you have no right to be mayor and you have no right to put off the election. [¶] The election, as far as I can tell, is in full accordance with the applicable rules."

Fitch replied, "I understand," but nevertheless briefly attempted to pursue the issue of service, ending by saying "maybe . . . it wasn't explained clearly. I don't know." The hearing ended with this:

"THE COURT: It may not have been explained clearly. And I'll take responsibility for that, as well.

"Okay. So I'm going to deny the request for preliminary injunction. That does not mean your case is over; you can pursue the case in any way that you wish. But right now it means I'm not putting off the election; I'm not interfering with the election process.

"Okay. Good luck to everybody."

Following the hearing, Judge Kahn filed a written order that provided in relevant part as follows: "Having considered the pleadings, papers and exhibits filed in support of and in opposition to the Motion, this Court concludes a preliminary injunction should not issue. Plaintiff is not likely to succeed on the merits because he is not legally entitled to become Mayor or to stop the election from proceeding, and the City and its voters would suffer greater injury from the grant of a preliminary injunction than Plaintiff would suffer from its denial. [¶] Accordingly, IT IS ORDERED THAT Plaintiff's Motion for Preliminary Injunction is hereby DENIED."

The June 5 election proceeded and London Breed was elected Mayor, assuming office on July 11.

On June 13, Fitch filed what he called a "Notice of Appeal", but which went on for several pages with claimed allegations by Fitch.

On June 25 the Department filed a demurrer to Fitch's First Amended Complaint, accompanied by a Request for Judicial Notice. Fitch filed a response, and the Department a reply. The demurrer came on for hearing on July 19, again before Judge Kahn, which hearing began with this colloquy:

"THE COURT: Good morning to both of you.

"So Mr. Fitch, I know you genuinely believe in your case and you believe that you have been wronged. In my view you have not. And the recent election has now mooted your case. [¶] Do you want to tell my why that's not true?

"MR. FITCH: Well, there is merit to the case. And I would like to submit this document.

"THE COURT: What is that document?

"MR. FITCH: This is a document that is requesting to strike the substitute attorney therein concurrently with the hearing on demurrer. I haven't received any documentation filed through the Clerk's Office or handed to the Plaintiff or Judge Kahn by Deputy City Attorney John Geivnor . . ., in removing his name from case number CGC-18566257.

"THE COURT: So you are trying to eliminate Mr. Snodgrass's participation in this case?

"MR FITCH: No, Mr. Snodgrass will eliminate himself. [¶] If I can go on.

"THE COURT: You may."

Fitch went on for a few pages, once again expressing concern about different lawyers representing the Department. The hearing ended with this colloquy:

"THE COURT: So I am going to confirm the tentative ruling. I do not believe there was any requirement for certification of the papers or file stamping of the papers.

"I believe that Mr. Snodgrass is of the same office as Mr. Geivnor and Mr. Snodgrass can replace Mr. Geivnor or be in addition to Mr. Geivnor. And I do believe that the recent election has mooted your case. And that even if it had not, your understanding of San Francisco election laws and California election laws is mistaken.

"But I wish you luck. And if you do wish to appeal my decision, you are free to do that. And I think you have 60 days to do that.

"MR FITCH: Yes, I did that already."

Judge Kahn then entered an order that concluded as follows: "Defendant Department of Elections for the City and County of San Francisco's demurrer to the entirety of the First Amended Complaint filed by plaintiff John Fitch is sustained without leave to amend. With the election of the new mayor, all of Mr. Fitch's claims are now moot. Even if those claims were not moot, they lack merit as a matter of law because Mr. Fitch is not entitled to be mayor." A judgment dismissing the action followed.

The Proceedings on Appeal

On April 29, 2019 Fitch filed what is entitled "Appellant's Brief Notice of Appeal" which, not counting five pages of attachments, is seven pages long. It contains a one-page "Table of Authority," which is followed by five pages of what is called "Appellant Notice of Appeal," which pages contain a brief "Statement of Appealability" followed by a 31-line "Statement of Case," which begins as follows:

"I'm asking this Court to take a De Novo Review, The Appellant has styled his complaint as a Breach of Contract Action and the Existence of a Contract after the Sudden Death of Mayor Edwin Lee. San Francisco Board of Supervisors President London Breed was supposed to be the Mayor. [U]nder San Francisco Charter Amendment section 13. 101. 5 (B).

"But then a loop hole came about where the acting Mayor position was challenge by amicus curiae, at which time the acting mayor position was usurp by the Doctrine Stress Separation of power."

There follows a 39-line "Statement of Facts" which, following some references to Florida law and various attorneys representing the Department, ends with this:

"I'm asking this Court to De Novo and Withdraw or Strike the Demurrer and Declare a Default, and a Win for The Appellant. The RT and the CT represent a victory for the Appellant.

"The Appellant name is being shown as active from a letter from the Secretary of the State Alex Padilla see exhibits). Citing *Brandt v. Superior Court* (1985) 37 Cal.3d. 813 is acting in bad faith, Subterfuge, Usurping and Collusion. The Appellant followed all rules to remain active in case of sudden death of a Mayor.

"The Appellant is asking this Court to De Novo and Withdraw or Strike The Demurrer Citing 2005 California Code of Civil Procedure Sections 435 – 437 CHAPTER 4. Motion To Strike, and so all Facts and Exhibits can be properly look at as to Why the Appellant should be Compensated For Irreparable Injuries For The Sum Of $700.000."

Appellant's brief concludes with a one-page "Argument," which provides in its entirety as follows:

"ARGUEMENT:

"I know it's not easy to arrive at its Conclusion Lightly, But the facts and findings has taken us there. The Appellant is asking this Court to take a De Novo Review, this is likely the deeply etched Case in San Francisco History. The Culmination of facts has reach the Pinnacle of this Case. On pages 052 thru 055 of the RT a Motion for a preliminary injunction was filed. The RT Pages 5, and 6 Shows The Department of Election fail introduce the Appellant Name to the San Francisco Board of Supervisors for Interim Mayor. Which made the Appellant Non-existent as far as they were concern. This was Concealment Rather Than Disclosure; all facts weren't taken in Consideration. Where all facts weren't taken in Consideration. Therefore, The Demurrer should be a Default and Withdrawn or Strike. And a Win for The Appellant. I kept up on all the annual requirements through the Ethic commission to remain Certified. To this Day The State of California Online Data Spreadsheet Will Show.

"Now I'm not treated like a human being, and not treated like a person. I followed all Rules and Regulations in the house of justice. and yet there was No Justice for the Appellant. So I'm asking this Court to Consider All Facts in The RT. Don't turn away from the truth, don't turn away from your conscience, Justice is all I ask for.

"Appellant is asking that this Ruling Be Reversed.

"I want to thank this court for your attention."

Fitch's brief is manifestly deficient, as it fails to address, much less overcome, two fundamental principles of appellate review: (1) "A judgment of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133); and (2) " 'an appellant " 'must affirmatively show error by an adequate record. . . . Error is never presumed.' " ' " (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 639.)

Keyes v. Bowen (2010) 189 Cal.App.4th 647 applied these principles in the identical setting here, an appeal from a demurrer sustained without leave to amend saying this: "The fact that we examine the complaint de novo does not mean that plaintiffs need only tender the complaint and hope we can discern a cause of action. It is plaintiff['s] burden to show either that the demurrer was sustained erroneously or that the trial court's denial of leave to amend was an abuse of discretion. [Citations.]" As *Keyes* also observed, "the trial court's judgment is presumed to be correct, and the appellant has the burden to prove otherwise by presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited." (*Keyes*, *supra*, 189 Cal.App.4th at p. 655.) In sum, our review is "limited to issues which have been adequately raised and supported in [Appellant's] brief." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 8:17.2, p 8-6 to 8-7.)

These principles dictate that Fitch's appeal must fail. So, too, does the applicable law, which demonstrates that Judge Kahn's rulings were right on.

As noted, the fundamental aspect of Fitch's pleading sought to enjoin and "delay" the June 5 election. As also noted, the election happened. Thus, Fitch's claim is moot, as demonstrated by *Lenahan v. Los Angeles* (1939) 14 Cal.2d 128, which is on point. There, like Fitch here, Lenahan sued to enjoin a mayoral recall election. By the time the issue reached the Court, the election had already occurred. The Supreme Court held the action was moot, noting that, "It appears beyond question that every act sought to be enjoined

has actually taken place." (*Id*. at p 132; accord, *Bradley v. Voorsanger* (1904) 143 Cal. 214; *Coronado v. Sexton* (1964) 227 Cal.App.2d 444.)

While the injunction was Fitch's main claim, he also had a claim, however vaguely set forth, for $700,000 in damages, alleged in the First Amended Complaint this way:

"DAMAGES [¶] My damages were breach of contract.

"The plaintiff wasn't giving the opportunity in becoming interim Mayor.

"Therefore, my contract was breached because I wasn't given the opportunity for guaranteed pay, that was undertook from the whole contract, it left the plaintiff physically and emotionally distressed."

Nowhere in his First Amended Complaint—nor anywhere else for that matter—has Fitch alleged that he filed a claim under the Government Claims Act. This is fatal to any claim for damages.

"The Government Claims Act (§ 810 et seq.) 'establishes certain conditions precedent to the filing of a lawsuit against a public entity. As relevant here, a plaintiff must timely file a claim for money or damages with the public entity. (§ 911.2.)' [Citation.] '[T]he claims presentation requirement applies to all forms of monetary demands, regardless of the theory of the action,' subject to certain statutorily enumerated exceptions. . . . 'The failure to timely present a claim for money or damages to a public entity bars the plaintiff from bringing suit against that entity.' [Citations.] 'A cause of action that is subject to the statutory claim procedure must allege either that the plaintiff complied with the claims presentation requirement, or that a recognized exception or excuse for noncompliance exists. . . .' (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 338.) Failure to allege facts demonstrating or excusing compliance with the Government Claims Act's claim presentation requirement "subjects a complaint to general demurrer for failure to state a cause of action." (*State of California v. Superior Court* (*Bodde*) (2004) 32 Cal.4th 1234, 1240–1241.)

The judgment is affirmed. The Department shall recover its costs on appeal.

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

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